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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 74-6257, 75-5394, 75-5491, 75-5706, 75-5844

No. 74-6257

TROY LEON GREGG, *Petitioner,*

vs.

GEORGIA, *Respondent.*

No. 75-5394

JERRY LANE JUREK, *Petitioner,*

vs.

TEXAS, *Respondent.*

(Continued on inside cover)

On Writs of Certiorari to the Supreme Court of Georgia, the Court of Criminal Appeals of Texas, and the Supreme Courts of North Carolina, Florida, and Louisiana, Respectively

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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No. 75-5491

JAMES TYRONE WOODSON and LUBY WAXTON, *Petitioners,*

vs.

NORTH CAROLINA, *Respondent.*

No. 75-5706

CHARLES WILLIAM PROFFITT, *Petitioner,*

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Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning a Significant Part of Our Nation's Existence and the Petitioners Have Presented No Constitutional Basis for the Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth or Fourteenth Amendments 10

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in the question presented on the grants of certiorari in these cases, that is, whether the imposition and carrying out of the sentence of death for the crime of murder under the laws of the respondent states violates the Eighth or Fourteenth Amendments to the Constitution of the United States. .... U.S. ...., ... S.Ct. ...., ... L.Ed.2d ....; 44 Law Week. 3439.

For the reasons set forth below the State of California will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above-entitled matters.

This issue was before this Honorable Court this past term in the case of *Fowler v. North Carolina*, No. 73-7031, argued April 21, 1975, and on June 23, 1975, rescheduled for argument this term. On February 23, 1976, the order rescheduling argument was revoked. The State of California filed an amicus brief in *Fowler* and set forth its position on the question at length. Reference will be made to that brief herein.

The State of California was one of the parties appearing when this issue was argued during the October 1971 term, *Aikens v. California*, No. 68-5027, reported in 403 U.S. 952, 91 S.Ct. 2280. The order granting certiorari in *Aikens* was made on June 28, 1971, and the question was stated, "does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." On the same date, simi-

lar orders were made in *Furman v. Georgia*, 403 U.S. 952, 91 S.Ct. 2282; *Jackson v. Georgia*, 403 U.S. 952, 91 S.Ct. 2287; and *Branch v. Texas*, 403 U.S. 952, 91 S.Ct. 2287. In the *Aikens* case, in contrast to the other three cases, at the guilt and penalty phases in the California court, three brutal murders were proved and, in the brief for the petitioner Aikens, it was conceded "we made no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted on this petitioner." Petitioner's Brief, *Aikens v. California*, page 5.

Aikens and the companion cases were set for argument on January 17, 1972, but about 10 days prior thereto the California Supreme Court set for argument the case of *People v. Anderson* (Crim. No. 13617), which was ultimately reported in 6 Cal.3d 628 [498 P.2d 880] (1972). In the *Anderson* case, the California Supreme Court, on February 18, 1972, held that capital punishment was unconstitutional under Article I, section 6 of the state constitution in that it came within the proscription of the cruel or unusual punishment clause thereof, finding that it was cruel and also unusual.[1]

After the *Anderson* case was decided, the suggestion was made to this Honorable Court that the *Anderson* decision mooted the issue involved in *Aikens* and that as a consequence the petition should be dismissed. Accordingly, on June 7, 1972, this Honorable Court in *Aikens v. California*, 406 U.S. 813, 814, determined, on the Suggestion of Mootness and Motion for Remand, the decision of the state court having rested on an

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[1]*Cf. In re Anderson*, 69 Cal.2d 613, 629-32 [447 P.2d 880] (1969) in which the holding was that capital punishment was *not* cruel or unusual.

adequate state ground and the holding having been determined by the California court to be fully retroactive and applying to any prisoner in the State of California under sentence of death, that the petitioner Aikens no longer faced a realistic threat of execution and that the issue upon which certiorari was granted was moot. Accordingly, the writ of certiorari was dismissed.

On June 29, 1972, this Honorable Court rendered the decision in *Furman v. Georgia* reported in 408 U.S. 238, holding that in *those* cases (*Furman, Jackson* and *Branch*) the imposition and carrying out of the death sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Thereafter, through exercise by the People of the initiative, the Constitution of the State of California was amended, effective on November 7, 1972, to state as set forth in Article I, section 27, that the death penalty provided in the State statutes should not be deemed to be infliction of cruel or unusual punishment within the meaning of Article I, section 6, or any other provision of the state constitution. The amendment to the state constitution is attached to this brief and marked Appendix A.

Following the amendment of the state constitution and the ruling of this Honorable Court in *Furman v. Georgia, supra,* the Legislature of the State of California, by Senate Bill 450, which subsequently became Chapter 719 of the Statutes of 1973, enacted statutory provisions to reinstate the death penalty in certain circumstances. Chapter 719 became effective January 1, 1974, and the portions thereof relating to the crime of murder and the punishment therefor are attached to this brief and marked Appendix B.

Pursuant to this statute, and following the effective date thereof, approximately 43 defendants have been sentenced under its provisions and are awaiting automatic review of their appeals in the California Supreme Court. At this writing, no case has been scheduled for argument before that Court.

It is evident that the People of the State of California, by the exercise of the initiative, made clear the consensus of society as reflected in the various legislative enactments and which had been clearly indicated previously in the State Constitution[2] that capital punishment was an acceptable punishment for the most serious crimes and, of great importance, that its abolition should be effected only by the constitutional procedure provided therefor and not locked into the constitution forever by judicial edict.

Amicus contends that neither the "cruel and unusual" clause of the Eighth Amendment nor any of the provisions of the Fourteenth Amendment to the United States Constitution should now be construed as a bar to the states or to the Congress to provide the death penalty as a punishment for serious crimes.

The acceptance by this Honorable Court of the contention of the various petitioners that the Federal Constitution bars the imposition of this punishment for the crime of first degree murder implicates the statute of California, as well as the statutes of the majority of the States. Amicus is concerned that petitioners herein seek to importune this Honorable Court to "lock into" the United States Constitution the abolition of capital punishment and to place beyond the

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[2]Article I, sections 6, 8, and 13 as they then read, made reference to capital crimes. Article VI, section 11, gives the Supreme Court direct appellate jurisdiction in *capital* cases.

power of Congress and the People, through the legislatures of the several states, the right to determine that the protection of society from serious crimes requires the availability of this sanction, a dilemma which confronted the People of the State of California in November of 1972.

The State of California has been authorized by the Attorney General of Oklahoma, the Honorable Larry Derryberry, to inform the Court that the State of Oklahoma joins in this brief and in urging that the provisions of the United States Constitution do not prohibit capital punishment as a penal sanction for serious crimes.

The Attorney General of Arizona, the Honorable Bruce E. Babbitt, has authorized us to state to the Court that Arizona joins in this Amicus Brief in urging that this Court not hold State and Federal statutes providing for capital punishment to be unconstitutional.

The Honorable Paul L. Douglas, the Attorney General of Nebraska, has advised us that the State of Nebraska joins with California in this Amicus Brief and in urging the constitutionality of capital punishment.

Likewise, we are advised by the Attorney General of Nevada, the Honorable Robert List, that the State of Nevada joins in our Brief and in urging the constitutionality of legislation providing for the death penalty for serious crimes against society.

Summary of Argument

Amicus contends that capital punishment has been recognized as a permissible form of punishment since this Nation's inception and that the United States Constitution does not forbid Congress or the legislatures of the various states from providing this penal sanction for serious offenses against society.

This form of punishment was expressly referred to in the Fifth Amendment, adopted at the same time as the Eighth, and the Fifth Amendment recognized expressly what had been implied in the provisions of the Constitution as originally drafted.

The Constitution's Preamble stated an important purpose in our Union's formation: to insure domestic tranquility. The first section of Article I delegated to Congress the legislative powers and the judicial branch recognized that it was for the legislature, not the courts, to define and ordain the punishment of crime.

Amicus acknowledges that the petitioners do not quarrel with these truths. However, petitioners' argument goes as follows: it is the Judicial Branch which must determine whether an act of Congress contravenes the Federal Constitution when such a challenge is made.

Amicus does not quarrel with this concept. It is acknowledged that this function is the gravest and most delicate duty that the Court is called upon to perform.

Amicus does challenge the contention that the lack of power to declare capital punishment unconstitutional relegates the Court's function under the Eighth Amendment to "mere advice," and amicus also challenges the contention that the power to invalidate Congressional and state legislation providing for this punishment comes from a "judicially induced" finding that society has "rejected" this form of punishment and that proof of the lack of penal utility is now so "conclusively" shown that the Constitutional process of lawmaking must be bypassed and this Court must now "declare" that the punishment, provided for in

our Constitution and accepted or implied in an impressive line of decisions, is now unconstitutional under the incantation of an "evolving standards of decency" doctrine.

Petitioners cannot escape the deep-rooted history of capital punishment in this country. Likewise decisions of this Honorable Court have accepted this form of punishment as constitutional and even as late as 1958, in the case relied on for the "evolving standards" concept (*Trop,* 356 U.S. 86) it was stated that in view of its acceptability in society capital punishment could not be declared as violative of the Eighth Amendment's concept of cruelty.

In arguments that should be presented to the Legislative Branch and not the Judicial, petitioners contend that no penal purpose is served by this sanction. Amicus contends that the determination of Congress and the majority of the state legislatures that capital punishment should be available for serious offenses is amply supported. While not conceding that the People bear the "burden of proof" on the issue, it is clear that the goals of deterrence, isolation or incapacitation and retribution are served by this penal sanction.

There exist obvious flaws in the methodology of the studies upon which the abolitionist forces relied over the years and recent studies have raised serious questions about the conclusions drawn by the statistical messiahs of abolition. There are many graphic illustrations of the deterrent effect of the death penalty presented by respondents and amicus and a brief reference to this Court's decisions reveals judicial recognition. The inadequacy of "life" imprisonment as a means of isolation and incapacitation is well documented.

The petitioners' claim that this form of punishment has been "rejected" by society is ably refuted even by their own evidence. The legislatures of a majority of the states and the elected representatives of the People in Congress have acted since this Court last spoke on the issue to provide for this punishment in the effort to protect society from the violent criminal. This action is powerful evidence of the continuing recognition by the People, through their elected representatives, of the need for and the acceptability of this form of punishment by society. It is further submitted that any so-called "worldwide" trend has no relevance on any constitutional issue before this Court.

Any preoccupation of petitioners with the judicially arrested rate of executions as an indicator of popular rejection of this punishment is to ignore the much more accurate barometers of the consenus of society such as the number of defendants sent to the nation's prison systems under sentence of death over the recent years.

Amicus submits that nothing has happened in the 187-year history of the Constitution which requires this Court to today declare that the punishment, expressly recognized in our Constitution and upheld by a line of decisions spanning a good part of our nation's existence, to be in violation of the Eighth or Fourteenth Amendments.

Amicus urges this Court to recognize the action of a coordinate branch of the government and to refrain from declaring, as a Constitutional "command," that capital punishment, recognized throughout our history as a proper penal sanction, is now "cruel and unusual."

ARGUMENT

I

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning a Significant Part of Our Nation's Existence and the Petitioners Have Presented No Constitutional Basis for the Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth or Fourteenth Amendments

A. Introduction

Amicus will direct the argument to the contention that the infliction of the punishment of death is excessive (captioned in *Fowler*, Part III, as "The Excessive Cruelty of Death"), and in violation of the Eighth or Fourteenth Amendments to the United States Constitution.[3]

Petitioners, in asserting this argument, make reference to the Petitioner's Brief in *Fowler v. North Carolina*, Part III, pp. 102-140 and to the same argument in Part III of the Petitioner's Brief in *Jurek v. Texas*, No. 75-5394.

The various procedures provided in the respective state statutes for initiating the prosecution, the disposition thereof before trial, jury determination of guilt and the exercise of executive clemency are adequately covered in the briefs of respondents in the five cases

[3]The Petitioner Fowler's Brief, Part III, pp. 102-140, is incorporated in all of the Petitioners' Briefs herein. Amicus does not have a copy of the printed briefs of petitioners and pagination of those briefs is omitted herein.

herein and in the Amicus Briefs of the Solicitor General of the United States in *Fowler* (pp. 55-77), and in these cases, and will not be elaborated on herein.

Amicus submits that *Furman* struck down the imposition and carrying out of discretionary death sentences and that it did not touch upon the other functions in our criminal justice system, referred to by the various petitioners herein as "these mechanisms" and as "a pervading network of mechanisms" (*Jurek* Brief, typewritten copy, p. 85.)

The prosecutor is a public officer charged with duties and obligations as a member of a coordinate branch of government. He can take into account special facts and circumstances of the particular case not taken into account by rigid rules. Traditionally this function has not been disturbed except where the exercise thereof has been based on a suspect or unjustifiable standard, such as race, religion, or other arbitrary classifications. *See Oyler v. Boles*, 368 U.S. 448; *Newman v. United States*, 382 F.2d 479, 480. This rule would also be applicable to pleas and other dispositions in the individual cases. *Furman* likewise was not directed at the fact-finding function of juries and this was not the "discretion" of which the Court spoke; nor was the clemency power of the executive impugned.

Petitioners have not shown any reason why these vital functions in the system of justice, and to which *Furman* was not directed, should be treated differently when a death penalty is possible. It is submitted that

in arguing such a departure from customary procedure in the federal and state systems of criminal justice petitioners read too much into *Furman. See State v. Jarrett,* 284 N.C. 625, 202 S.E.2d 721, 741-743.

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty

Under the caption "The Standard of Judicial Review" (Part III, Petitioner *Fowler's* Brief, pp. 103-121), petitioners attempt to have this Honorable Court ignore the clear mandate in the Constitution, the amendments thereto and the decisions of this Court in numerous cases throughout our history and to hold that now, because of some talisman called "evolving standards," the death penalty is forbidden to Congress and the various states by the Eighth Amendment.

It is the contention of amicus that the United States Constitution does not forbid the Congress and the various states from providing such a sanction in performing the function of affording protection to the law abiding citizens.

The petitioners would have the Court accept as a truth their assertion that retention of the power by the People, through their elected representatives to abolish or retain capital punishment relegates the function of the Court under the Eighth Amendment to "mere advice."

Such an argument ignores the exercise of the Court's Constitutional power in Eighth Amendment cases in *Weems v. United States,* 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86; *Robinson v. California,* 370 U.S. 660, etc.

This Honorable Court has never avoided its responsibility to consider, in a particular case, whether the Eighth or Fourteenth Amendments have been offended.

However, the Court has not considered itself free to read into a portion of the Constitution a meaning that is plainly at variance with its language or to inject the Court's own predelictions into the Constitution.

The Constitution, in particular the Eighth Amendment, contemplated that the People, through their elected representatives, should have the ultimate alternative of determining the punishment for crime. The intent of the Framers of the Constitution and its amendments was to bar those punishments which are both cruel and unusual either in their inherent form or grossly excessive in their application in relation to the seriousness of a particular criminal act.

It is clear, as will be developed *infra,* that the Eighth Amendment did not outlaw what had been recognized in the Fifth Amendment, adopted at the same time. The action of Congress, both before and after the addition of the Amendments, constituted contemporaneous interpretation of the acceptability of capital punishment. A line of decisions, spanning a good part of our nation's history, verify the constitutionality of this form of punishment. As recent in our history as 1958, *Trop, supra,* recognized that even though society's evolving standards may be recognized, the Court also recognized the current social acceptability of capital punishment. Certainly nothing has changed since then including the determination of the adherents of the petitioners' position, misdirected as it is to the Courts instead of to the legislatures.

One of the purposes of our Union, as stated in the Preamble to the United States Constitution, was to insure domestic tranquility. On the National level the Constitution provided that legislative powers were to be granted to the Congress (Art. I, sec. 1).

Early in the history of our nation it was determined that the power of punishment is vested in the legislative, not the judicial department. Chief Justice Marshall said (*United States v. Wiltberger,* 18 U.S. 76, 93):

> ". . . It is the legislature, not the court, which is to define a crime, and ordain its punishment."

The Constitution provided for the separation of the powers of the branches of government and this required that when an act of Congress was challenged on the ground that it contravened the Federal Constitution, the function of the Court was to determine whether the legislative action was clearly outside the Constitutional grant of power.

In making that determination this Honorable Court sits in judgment on a co-ordinate branch of government, while keeping to itself the final determination of its own power to act. This function, Mr. Justice Holmes called the gravest and most delicate duty that the Court is called upon to perform. ***Blodgett v. Holden,*** 275 U.S. 142, 148. *See Furman v. Georgia, supra,* pages 431-32, Justice Powell dissenting.

Mr. Justice Frankfurter, dissenting in *Trop v. Dulles, supra* (at 119, 356 U.S.) quoted Madison that all power is not immune from this human weakness. He said that the Court must be on guard against encroaching beyond its proper bounds and no less so since the only restraint upon itself is self-restraint.

This, he said, involves the rigorous observance of the difference between limits of power and the wise exercise of power (questions of authority and questions of precedence) and this requires the most alert appreciation of the decisive, but subtle, relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not too easy to stand aloof and let a want of wisdom prevail, and disregard one's own strongly held view of what is wise in the conduct of affairs. But, he noted, it is not the business of the courts to pronounce policy. The Court must observe a fastidious regard for limitations on its own power and this precludes the Court's giving effect to its own notions of what is wise and politic.

Restraint is of the essence of the observation of the judicial oath, for the Constitution has not authorized judges to sit in judgment on the wisdom of what Congress and the Executive Branches do.

If there is to be any change in these constitutional concepts the Constitution contains the proper device therefor, the amendment of the Constitution as provided by Article V thereof.

For the purposes of due process it is the consensus of society's opinion that is the standard enjoined by the Constitution. In a democracy, this consensus is expressed by the legislative will of the elected representatives of the People. *Francis v. Resweber,* 329 U.S. 459, 471, Justice Frankfurter concurring.

Thus, the judgment as to the feasibility of capital punishment is one that the Constitution delegates to the Legislature. The Eighth Amendment has not in the past, nor does it now, forbid to the Congress

or the legislatures of the several states the power to determine that capital punishment can serve a proper penal purpose in the structure and framework of the criminal justice system.

Chief Justice Burger, dissenting in *Furman, supra* at 384, set the proper standard for judicial review of this matter,

> "I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."

Such evidence has not been forthcoming!

Amicus submits that there is no issue before this Court of the wisdom or social desirability of capital punishment. These are questions addressed wholly to legislators. Those who may be personally opposed to capital punishment may conclude that it violates no provision of the Constitution. The petitioner strives to wrest from the Constitution the power in the court to now declare that what was accepted as a mode of punishment for crime from the time of the inception of the Nation is no longer to be tolerated by the Constitution. This is a task of some magnitude in light of the authorities which will be reviewed.

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People

The history of capital punishment in this country and the deep-rooted origins of that form of punishment in the religious and moral heritage of contemporary America provide clear indications that the death penalty is no barbaric relic of the past.

Execution as a form of punishment is expressly recognized by provisions of the United States Constitution. The Constitution, as originally written, contained indirect allusions to capital punishment. Among the Constitution's objectives as set forth in the preamble were to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Further evidence of the Framers' intentions is contained in Article II, section 2, giving the President power to grant reprieves (withdrawal of sentence of death) and Article III, section 3, providing that Congress shall have power to declare the punishment for treason, the common punishment then, and now in jurisdictions retaining capital punishment, being death. The specifications of these objectives suggest that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary to protect the lives, liberties and properties of its citizens. *See In re Kemmler*, 136 U.S. 436 at 449. Absent particular prohibitions written into the Constitution, this was to be the rule. Similarly, three years later, the Tenth Amendment recognized that powers not prohibited to the states or delegated to the federal government were reserved to the respective states or to the People.

The history of the phrase "cruel and unusual punishment" and its inclusion in the first ten Amendments to the United States Constitution has been treated at length in recent opinions of this Honorable Court and in some exhaustive commentaries by scholars. *See* Granucci, "Nor Cruel and Unusual Inflicted Punishments: The Original Meaning," 57 Calif. L. Rev. 839. One fact stands out clear and was well stated by Mr. Justice Black, concerring in *McGautha v. California*, 402 U.S. 183 at 226, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment."

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these, the Fifth Amendment expressly recognized what had been implied in the provisions of the original Constitution, that death was among the forms of punishment for criminal conduct available to the federal government. The Fifth Amendment contains a mandate that "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of the grand jury." The amendment further commands that no person "be twice put in jeopardy of *life*", nor deprived of *life*, liberty, or property, without due process of law. This language was included and made applicable to the States in 1868 by the Fourteenth Amendment.

The following chronology further refutes the contention that those who enacted the Eighth Amendment

intended thereby to abolish capital punishment. The amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later, enacted "An Act for the Punishment of Certain Crimes Against the United States", which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. *See* Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33. 1 Stat. 112. The Eighth Amendment was ratified by the states on December 15, 1791, and less than four months later on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19. 1 Stat. 246.

As will be developed hereafter, the interpretation of the clause by this Court[4] confirms the conclusion that capital punishment was not prohibited to the federal government or the states by the Eighth Amendment.

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years

The subsequent history of the Eighth Amendment as it has been interpreted by this Court in 185 years of its existence likewise lends no support to the claim of petitioners that the death penalty is unconstitutional when carried out without unnecessary cruelty as punishment for a serious offense such as murder.

One of the first occasions this Honorable Court had to consider at any length the constitutional pro-

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[4]When *Furman* was before this Court, the constitutions of 48 states contained some provision against excessive punishment but, with the California experience excepted, no state court had interpreted these provisions as abolishing capital punishment.

hibition against cruel and unusual punishment was in 1878 in the case of *Wilkerson v. Utah*, 99 U.S. 130. In that case the Court upheld the mode of execution, shooting, as not forbidden by the Constitution's prohibition against cruel and unusual punishment. This Court noted the difficulty in defining "the extent of the constitutional provision" but the applicability of the provision to punishments of torture and all others involving unnecessary cruelty.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436, 447. This Honorable Court denied the application on the grounds that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life.*" (Emphasis added).

In *Weems v. United States, supra*, 217 U.S. 349, this Honorable Court in 1910, for the first time, overturned a punishment as cruel and unusual. In that case the defendant, on conviction of falsifying an official document, had been sentenced to 15 years of hard labor to be served in wrist and ankle chains with attendant life-long disabilities and a severe fine. The case arose under the Philippine Bill of Rights, whose prohibition against "infliction of cruel and unusual punishment, was taken from the Constitution of the

United States and must have the same meaning." (*Id.* at p. 367).

This Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual clause was thought to apply noting that the clause, like all principles "to be vital must be capable of wider application than the mischief which gave it birth." Quoting from Cooley's Constitution Limitations, the Court stated that it was probable that "any punishment declared by statute for an offense which was punishable the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In setting aside the punishment in *Weems*, this Court noted that "there are degrees of homicide that are not punished so severely" and that the statute in question had no parallel in American legislation and came from a government of different origins. The Court found the statute "cruel in its excess of imprisonment and that which accompanies and follows punishment. It is unusual in its character. Its punishments came under the condemnation of the Bill of Rights, both on account of their degree and kind." (*Id.* at p. 377).

In 1947, the case of *Francis v. Resweber, supra*, 329 U.S. 459, was considered by the Court. In this case the issue was whether a pending second electrocution of a condemned murderer following an unsuccessful first attempt at execution constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Mr. Justice Reed, in announcing the judgment of the Court, discussed the issue under

the assumption, but not so deciding, that a violation of the Eighth Amendment would be violative of the Fourteenth Amendment's due process clause. The opinion concluded:

> "We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.
>
> ". . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanely*." (*Id.* at pp. 463-64; emphasis added).

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958 in the case of *Trop v. Dulles, supra,* 356 U.S. 86, in which Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate. Four justices rejected both theories and would have upheld the statute upon which the denationalization was premised.

Chief Justice Warren's opinion noted that initially, "since wartime desertion is punishable by death there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." While recognizing the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and *even execution* may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Emphasis added.) Thus the penalty in *Weems* was characterized as meeting the two-prong test of being cruel in its excessiveness and unusual in its character, as was the penalty in the case then before the Court. Stating that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Warren concluded that denationalization under the circumstances before the Court constituted "a form of punishment more primitive than torture." Significantly, Chief Justice Warren stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit of punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concepts of cruelty." *Trop v. Dulles,, supra,* at 99.

Thus the opinion of the Court, while recognizing the forceful *legislative* arguments against the death

penalty, rejected the *constitutional* argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applied to the states through the operation of the Fourteenth Amendment was dispelled in 1962 by the decision of this Court in *Robinson v. California,* 370 U.S. 660, which invalidated punishment of imprisonment imposed on the defendant by reason of his being found addicted to narcotics. In *Robinson* the Court's opinion focused not on the nature of the punishment, which was only 90 days in county jail, but on its inappropriateness as applied to a status, that of being a narcotic addict.

In 1968, this Honorable Court refused to extend its ruling in *Robinson* to the punishment, by a fine of $50, of a defendant convicted of the crime of being intoxicated in a public place, *Powerll v. Texas,* 392 U.S. 514. In this case the plurality opinion of the Court distinguished the punishment of status involved in *Robinson* from the punishment of the uncompelled act before the Court in *Powell.*

Seizing upon some of the language of the plurality opinion in *Trop v. Dulles, supra,* 356 U.S. 86, as proof that that decision signaled the end of the right of both the Congress and the legislatures of the various states to prescribe death as a punishment for first degree murder, the petitioners ignore the fact that the opinion in question went out of its way to recognize the Constitutional validity of the death penalty. The words that the petitioners stress are "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 101. To be fair to petitioners, the fixation with this phrase is understandable in view of the fact that it provides the only

arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishments, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In petitioners' attempts to avoid the impact of this history, they have failed to demonstrate that anything has transpired in the last 18 years since 1958 that has impugned the validity of the observation made by Chief Justice Warren that the death penalty "in a day when it is still widely accepted cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles, supra,* 356 U.S. 86 at 99.

Amicus contends that *Furman* did not overrule the cases discussed hereinabove or impugn their validity as proper interpretations of our Constitution. Further, that the short time since *Trop* was decided has not seen any retreat from the wide acceptance of capital punishment in this country which *Trop* recognized as foreclosing any constitutional rejection of capital punishment.

Amicus adopts the analysis of the Chief Justice in his dissenting opinion in *Furman v. Georgia, supra,* at 375-76, 396-403, that the Court did not rule capital punishment *per se* violative of the Eighth Amendment, but that the judgments in the cases before the Court were to be set aside because of discretionary sentencing practices; that the Eighth Amendment could not be construed to be a bar to the imposition of the sentence of death but that juries and judges were not to be permitted to make the sentencing determination in the same manner as they had in the past.

See also Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*", 25 Stan. L. Rev. 62;

"You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia", 6 Loycla L. Rev. 526 (1973).

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

The amicus contends that the death penalty does serve a vital purpose in the punishment structure of society and that this is a matter upon which the legislatures of the various states and the Congress must make the determination.

Amicus does not concede that it has the burden of providing that the death penalty is a superior deterrent by making this argument, nor that capital punishment must be established as a "more effective" punishment for crime in order that this penalty be constitutionally acceptable. It was not the intention of the Framers of the Constitution to require such a showing by Congress or the states.

The showing as to the social utility of capital punishment should be addressed to the legislative body and the burden, if any, which must be assumed in the judicial setting, is only to demonstrate that there is, in fact, a basis upon which the legislatures of the majority of the states and Congress could reasonably conclude that certain serious offenses should be punished by death.

It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges

the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26.

Most of the arguments against capital punishment made by the petitioners are based on moral, humanitarian, and pragmatic grounds which might well prove persuasive to the Legislature in considering a change in the law or to a governor asked to commute a sentence of a condemned person, but, in this Court, the arguments must stand or fall on their own since this Court is limited to the issue of constitutionality and it cannot write into the law its notion of morality or humanitarianism or its pragmatic preferences.

As a purely constitutional matter, the analysis made by petitioners gives too little weight to the elements of retribution and deterrence and gives too much weight to "advance concepts of behavioral science." It is submitted that the constitution does not require legislatures to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards.

See Goesaert v. Cleary, 335 U.S. 464, 466; *see also McGautha v. California, supra,* 402 U.S. 183, 221.

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence; (2) incapacitation or isolation; (3) rehabilitation; and (4) retribution.

As to rehabilitation, it is obvious that as to the serious criminal offender deemed not capable of rehabilitation and sentenced to death, this purpose of punishment is not viable.

In recent years, at least as to the non-violent offender, rehabilitation was considered the progressive goal of punishment. However, recent studies have cast much doubt on the effectiveness of rehabilitation in the penal system.

As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said,

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n. 47) (1970).

And as Mr. Justice Stewart said in his concurring opinion in *Furman v. Georgia, supra* at 308,

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment

> they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law."

One commentator (Morris R. Cohen, "Moral Aspects of Criminal Law", 49 Yale L.J. 987 at 1011-12), in discussing the retributive theory of punishment said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of the feud and vendetta. He also noted that rather than calling this urge of human nature to be a "passion for revenge" it could with equal aptness be termed the "passion for justice." (Cohen, "Law Without Order", p. 42.)

See also: Packer, Comment, "Making the Punishment Fit the Crime", 77 Harv. L. Rev. 1071, 1078.

One purpose of punishment is isolation or incapacitation. Despite petitioners' insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In California, life imprisonment means the prisoner is eligible for parole after serving seven years of his term. Cal. Pen. Code § 3046. The myth that paroled or incarcerated murderers do not kill again evaporates upon a perusal of just a few of the California case reports: *People v. Robles,* 2 Cal.3d 205, 213 [466 P.2d 710, 712]; *People v. St. Martin,* 1 Cal.3d 524, 529 [463 P.2d 390, 392]; *People v. Vaughn,* 71 Cal.2d 406, 412 [455 P.2d 122, 124]; *People v. Hall,* 199 Cal. 451, 458-59 [249 Pac. Rptr. 859, 861]; *People v. Peete,* 28 Cal.2d 306, 308-

09 [169 P.2d 924, 926]; *People v. Purvis,* 52 Cal. 2d 871, 875 [346 P.2d 22, 24]; *People v. Gilbert,* 63 Cal.2d 690, 702 [408 P.2d 365, 372].

It is also to be noted that before this Court on a petition for certiorari is another case from North Carolina, *State v. Jarrett,* October Term, 1973, No. 73-6877. In this case a convicted murderer escaped and in the process of escaping, raped a black girl and stabbed to death a white youth. *See State v. Jarrett, supra,* 202 S.E.2d 721. Certainly these are a few of what are many, many examples of the inadequacy of life imprisonment to protect society from such aggressive behavior. Congress and the legislative bodies of the various states are in the best position to determine the effectiveness of a form of punishment and to conclude that for certain crimes the death penalty is the most effective method of protecting society.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victim or a witness if in doing so he would risk only the same penalty—life imprisonment for murder—while increasing multifold his chances of avoiding apprehension. The armed robber of the one-man liquor store would not let the petitioners' views of the dignity of human life cause him to hesitate for a moment in killing the lonely figure behind the counter at a late hour when there are no other persons around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer to avoid apprehension and conviction, when without the death penalty the criminal will risk no added punishment if he does

away with his intended captor. This would also be true of the "lifer" in a correctional facility who is faced with only another life sentence for taking the life of a guard in prison. Such a sentence would not only be futile, but would make a mockery of our system of justice.

What, then, of deterrence? Have the petitioners conclusively established that the death penalty deters no significantly greater number of persons from committing murder than does the prospect of life imprisonment?

The studies upon which petitioners rely conclude that the death penalty exerts no discernible influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.

We may note that the statistical findings do not focus on the various differential factors that are operative in the various jurisdictions which they attempt to pronounce.

It has been observed that the opponents of capital punishment have been the ones who have been "active in research and prolific in their writings." (Ohio Legislative Service Commission Capital Punishment 31, Staff Research Report No. 46, 1961.)

However, this has changed in some measure now. Sellin and his disciples had been disputed in some recent surveys. The Solicitor General in the Amicus Brief in *Fowler,* No. 73-7031, referred to the Ehrlich study and his conclusion that when capital punishment

was *actually used* a significant number of lives were saved. Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life and Death", 65 American Economic Review 397 (June 1975).

It was evident that the statistical studies that the various petitioners had relied on were "fatally flawed" in the failure to hold constant other factors besides punishment that might influence the murder rate. *See generally* Posner, "The Economic Approach to Law", 53 Texas L. Rev. 757, 766-68 (1975).

The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology on which petitioners place so much reliance. Clearly the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed casual factor—that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors, naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty

of death in the appropriate cases, the annual number of executions in the United States dwindled to nothing. In this context, Amicus concurs with petitioners' apparent view that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable in the decade from 1953 to 1963. In 1963, the year of the last execution, except for the one in April of 1967, the rate was 3.8 per hundred thousand population. The rate climbed to 6.0 in 1968 and 6.9 in 1969. The current statistics are even higher and it is to be noted that nationwide, the murder increase has been marked since the judicially created moratorium on the death penalty in 1967. The period from 1968 through 1973 showed that the number of offenses of murder increased 42% and that the rate per hundred thousand inhabitants was up 35%. Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974) at pages 6-7. *See also* Uniform Crime Reports, 1974, released November 1975.

As Justice Marshall observed in *Powell v. Texas, supra,* 392 U.S. 514 at 531, with general reference to the deterrent effect of criminal sanctions,

> ". . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."

Amicus submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect. *See* Royal Commission on Capital Punishment Report, 1949-1953 at p. 24, sec. 68 (1953).

We must note the judicial recognition of the deterrent effect of capital punishment which is contained in the reports of this Honorable Court. *See Brady v. United States,* 397 U.S. 742, 755. This Court noted the deterrent effect of capital punishment in *United States v. Jackson,* 390 U.S. 570 at 581, when it was said that the inevitable effect of a statute providing for waiver of a jury trial to avoid possibility of a death penalty discouraged the assertion of the Fifth Amendment right to plead not guilty and that it acted to deter the exercise of the Sixth Amendment right to demand a jury trial, that such a provision "chills" the assertion of these rights by penalizing those who choose to exercise them. It has been recognized that the death penalty is the most severe and awesome penalty known to our law and that the threat of the death penalty has been identified as a factor to be given considerable weight in determining whether a defendant has deliberately waived constitutional rights. *See Parker v. North Carolina,* 397 U.S. 790 at 809-10 (Brennan, J., dissenting).

In *Fay v. Noia* ,372 U.S. 391, 397, 439-40, Noia's attorney testified at the habeas corpus hearing that defendant Noia was motivated not to appeal his case by fear that if successful he might get the death penalty on a retrial. Had he appealed, he would have run

a substantial risk of electrocution and, as this Court said, "His was a grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."

In another case, *North Carolina v. Alford,* 400 U.S. 25 at 40, in the dissenting opinion by Mr. Justice Brennan it was said that "it is sufficient to state that Alford *was 'so gripped by fear of the death penalty'* that his decision to plead guilty was not voluntary but was the product of duress as much so as the choice reflecting physical constraint." (Emphasis added.)

It is submitted that state legislatures, as well as the Congress, can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be "so gripped by fear" that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely clerk standing in a liquor store or the police officer attempting to effect an arrest. As the Joint Report of the Legislative Committee on Capital Punishment of Pennsylvania said, "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death.

See Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After *Furman v. Georgia*", 25 Stan. L. Rev. 62 at 76.

It must be recognized that the innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

Petitioners, undeterred murderers, assure us that the death penalty does not deter. The fact that it does not deter *all* is no reason for rejecting this form of punishment (particularly by constitutional mandate). The statistics to which reference is made lump the undeterrable murders with those that could possibly be deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of criminal conduct understandingly embarked upon, such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

At this point it may be well to refer to some information collected by those who have first-hand information concerning the deterrent effect of capital punishment, namely, those who deal with homicidal offenders.

Sheriff Peter Pitchess of Los Angeles County testified before the California Senate Committee on the Judiciary (1960) as follows:

> "But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent."

Likewise the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated his unqualified opposition to the abolition of capital punishment in an issue of the Uniform Crime Reports for the United States (1959 issue):

> "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessary ingredient."[5]

See Bedau, "The Death Penalty in America," pp. 130-146.

There have been many surveys conducted to test the deterrent effect of the threat of the death penalty. One is the study by the Los Angeles Police Department on Capital Punishment concluded in February, 1971. This survey confirmed the validity of the conclusion drawn by innumerable legislatures that the threat of the death penalty is a deterrent to murder and the incidents documented in the surveys are from contacts with criminals which are real and direct rather than merely academic. We, of course, do not imply that all those whose experience with the criminal world is purely academic conclude otherwise. One example is Van Den Haag, "On Deterrence and the Death Penalty", 60 J. Crim. L.C. and P.S. 141 (June 1969).

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[5]It may be noted that the Los Angeles Times (Nov. 16, 1966, Part I, p. 21) reported that "The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that since abolition of capital punishment . . . 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.' "

The Los Angeles Police Department survey, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. The positive statements made by the remaining 99 are classified as follows:

1.	Deterred by fear of death penalty from carrying weapon or operative weapon	50	(50.5%)
2.	Unaffected by death penalty because it was no longer being enforced	7	(7.07%)
3.	Undeterred by death penalty, would kill whether it was enforced or not	10	(10.1%)
4.	Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32	(32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides.
>
> "II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced.

> "III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty would deter then from being armed while committing crimes."

The report also notes,

> "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right to due process of law."

See Hearings before Subcommittee of the Committee on the Judiciary, House of Representatives, Statement of Frank G. Carrington, pages 237-39.

An earlier survey by the Los Angeles Police Department is reported in *People v. Love*, 56 Cal.2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J. dissenting).

It would appear that what this Court has previously noted is ably supported by the foregoing, that is, that certain potential murderers are "so gripped by fear of the death penalty" that they refrain from taking life endangering action when in pursuit of their criminal enterprises, or, better yet, they do not engage in such enterprises at all.

Petitioners refer to these surveys and the statements of the law enforcement officers as "impressionistic accounts" or as "anecdotal impressions" of the law enforcement officers. It is clear that Congress and the

legislatures of the various states have not treated so cavalierly these surveys and the testimony of those who come into daily contact with the criminal. *See* Royal Commission of Capital Punishment Report, 1949-1953, page 21, sec. 61 (1953).

Likewise, in Appendix E of the Brief of Petitioner Fowler, incorporated in the petitioners' briefs herein, there is listed some of the conclusions regarding the utility of capital punishment, with particular reference to its deterrent effect. Amicus contends that the Constitution does not permit social scientists (Br. for Pet. Fowler, Appendix E, pp. 3e-6e), law enforcement officers (pp. 7e-9e), or the undeterred prison immate (pp. 9e-10e) who has committed murder to fashion the contours of the Eighth Amendment.

It is submitted that petitioners have failed to show that the death penalty serves no legitimate function in our society. The United States Constitution gives to the Congress and the legislatures of the various states, the elected representatives of the People, the right to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime

Petitioners assert that society has rejected capital punishment and that this "rejection" must be finalized by means of a constitutional interpretation by this Court.

However, petitioners are quick to admit that a significant number of jurisdictions have enacted death penalty legislation since *Furman* (Br. for Pet. Fowler, p. 131),

adding that the legislation is narrower in all but two cases, than their pre-*Furman* authorizations of capital punishment. The response of the majority of states to accomplish the restoration of capital punishment is documented in Petitioner Fowler's Brief, Appendix A.

It is difficult to accept petitioners' arguments on the purported rejection by society when the elected representatives of the People in a majority of the states have so quickly responded to assure their constituents the protection of this sanction.

Petitioners also seem to argue that society has rejected capital punishment because, it is asserted, prosecutors are not bound by rigid charging and plea acceptance rules, juries are not restricted in their findings on the facts, and governors and presidents are permitted to grant clemency; further, it is contended that this punishment is only meted out to "racial minorities and to the poor."

Petitioners offer no proof of the validity of their legal assertions or of the factual claims and they are hard pressed in the attempt to make the "rejection by society" arguments appear realistic. Yet this Court is asked to accept these speculative arguments and to make a constitutional judgment based thereon!

Petitioners imply that it is only vengeful and misguided people, out of step with the "evolving standards of decency that mark the progress of a maturing society," who are in favor of the death penalty today. It is submitted that there are innumerable indicia of the public's continued general acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

While amicus wishes to emphasize that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys, nevertheless, since those who seek the abolition have relied over the years on such indicators in support of their various contentions that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, amicus feels compelled to put this contention in the proper perspective.

Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallup poll, characterized the United States as a nation less than half of whose people believed in the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 520. It is submitted that the recent polls demonstrate that public opinion has swung in favor of capital punishment. This has been illustrated not only in the Gallup polls that have been taken but also in the elections relating to retention or abolition of the death penalty.

Of course, the most recent large-scale expression of public opinion, as far as California is concerned, occurred in 1972 when the death penalty initiative passed by an overwhelming majority, over 67% of the voters voting in favor of the initiative (5,386,904 votes to restore the death penalty) and to enable the state to be restored to the constitutional balance in which the legislative branch was to make the determination as to whether capital punishment should be retained or abolished.[6]

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[6]Just last March a poll conducted in California revealed that 74% of the persons polled were in favor of capital punishment. Los Angeles Times, p. 1, Part I, March 25, 1975.

A similar referendum was held on December 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The referendum results were comparable to the results later obtained in California, and serve as a good indication of the national sentiment, in view of the fact that Illinois is another large state having a substantial metropolitan and rural population. The referendum resulted in 64.3% vote against the abolition of capital punishment.

Reference is made to the Solicitor's Brief in Fowler, Appendices A and B for the action by Congress providing capital punishment for various Federal crimes.

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions that retained this penalty at the time that this Court spoke in *Furman v. Georgia, supra.* At that time, the District of Columbia, the federal government, and forty of the fifty states retained capital punishment as a form of punishment for certain crimes. At the time *Furman* was decided, despite almost five years of the "moratorium," there were over 600 prisoners committed to prisons on judgments of death. In this connection, it can avail petitioners nothing to claim that there have been no executions for almost nine years, as the moratorium was the result of the efforts of the prisoners' attorneys and not "rejection by society" of this penalty.

Note must be made of the reported "strategy" of those in the forefront of the effort to obtain a judicial veto of legislation providing for the death penalty.

This is set forth in Meltsner, "Cruel and Unusual, The Supreme Court and Capital Punishment", 1973, Random House, page 107. The successful strategy was to have a moratorium to create a death-row logjam, the longer death-row inmates waited the greater their numbers and the more difficult it would be for the courts to permit the first execution since a resumption would bring a cry of "blood bath," or so it was contended.

Presumptively, it would also allow the argument that the "lack" of executions indicated society's "rejection" of this punishment. It also could give rise to a claim that this use of the judicial process caused the anguish purportedly suffered by those who waited for long periods for execution.

Such transparent arguments could not cause favorable responses from legislators, and there is no reason to believe that it can avail the proponents of abolition in the courts.

It is submitted that the accurate barometer of the "evolving standards" was the constant number of defendants whom juries annually sent to the nation's prison systems under sentence of death. U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968). It would appear that juries were continuing to perform their function in maintaining a link between contemporary community values and the penal system. *Witherspoon v. Illinois, supra,* at 519 n. 15.

The large majority of persons convinced of the need for capital punishment in America reflects a cross section of the nation's population. It is submitted that these persons, including retail clerks, grocery and

liquor store operators, pharmacists, bank tellers, gas station attendants and others who, like police officers, have frequent occasion to look down the "business end" of a robber's pistol or shotgun, do not share the petitioners' sentiment that the death penalty is a barbaric relic of the past. In short, contrary to the impression that petitioners seek to convey, there appears to be substantial support for the death penalty in almost all social, economic and occupational groups, and indeed, the preponderance of public opinion is in favor of retaining the death penalty as one of the forms of punishment available for serious offenses.

Petitioners apparently believe that this Court should respond to what they term the "world-wide" trend toward ending the use of the death penalty. It is submitted that this is a frail foundation upon which to postulate the unconstitutionality of the death penalty in this country. It is ridiculous to say that the Framers of the Eighth Amendment had in mind in 1789 that what nations did throughout the world should impair the ability of the various states to provide adequate punishment for those who violate the laws of the state. Certainly the availability of the death penalty for the protection of society was not to be judged by what occurred in countries such as Lichtenstein, Luxembourg, Surinam or Mozambique.

It has been stated that the total number of nations which are abolitionist represent a minority in the world community and it is to be noted that the conditions that lead any one of the foreign jurisdictions to conclude that a particular punishment is or is not required for the protection of its population varies from nation to nation as conditions vary from state to state within our own federal republic. It is further to be noted

that petitioners have not pointed to any democratic abolitionist nation which has rejected the death penalty by judicial declaration or edict!

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS 397, 411; Royal Commission on Capital Punishment, 1949-1953 Report 340.

Amicus understands that in England, which retains capital punishment for certain crimes as do many "abolition" nations, the House of Commons recently rejected a bill to restore capital punishment for certain violent crimes (*See* Br. for Pet. Fowler, p. 115 n. 174). Amicus finds it reassuring that a nation, sharing a common heritage with the United States, still permits decisions as to the utility and availability of capital punishment to be determined by the elected representatives of the People!

Amicus submits that petitioners cannot sustain their claim that contemporary society rejects capital punishment. It is further evident that even if they could sustain this claim, they would state no case for the invalidation of the death penalty by means of a new interpretation of the Eighth or Fourteenth Amendments by this Honorable Court.

Conclusion

In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the intent of the Framers and the will of the People by abolishing capital punishment. How much less appropriate would it be for

this Court, under the aegis of the Eighth or Fourteenth Amendments, to decree that this form of punishment, expressly sanctioned by the words of the Constitution and a long line of decisions by this Court, is now forbidden to the People by Constitutional mandate.

It is submitted that nothing has happened in the 187-year history of the Constitution which can alter the fact that the Framers contemplated the death penalty as a form of punishment of necessity available to the People and the states for the protection of society. Likewise, there has been no decision of this Court contravening the intent of the Framers, and contemporary society has accepted this sanction as a proper weapon to combat crime.

It may be appropriate, on the occasion of the celebration by the Nation of two centuries of existence, to recall the words of the first President counseling the young nation on the hazards that lay ahead and the wisdom of adhering to the separation of powers mandated by the Constitution:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another.—The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.—A just estimate of that love of power, and proneness to abuse it, which

predominates in the human heart, is sufficient to satisfy us of the truth of this position.—The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes.—To preserve them must be as necesary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. —But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.—The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.—"[7]

Amicus urges this Honorable Court to reject the siren call of those who grow impatient with the democratic process and to refuse to declare unconstitutional legislation enacted following *Furman* by the elected representatives of the People in the states, and in Congress, providing, in appropriate cases, for the imposition of capital punishment for first degree murder and other serious crimes.

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[7]"The Washington Papers," Edited by Saul K. Padover; Harper & Bros. Publishers, N.Y. The Farewell Address, Sept. 19, 1796, p. 308.

Amicus respectfully submits that no case has been made by petitioners to justify the Court taking the unprecedented step of invalidating Congressional acts and state statutes providing for the death penalty on the ground that this punishment is now "cruel and unusual."

Respectfully submitted,

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APPENDIX A

[Death Penalty]

Sec. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution. [New section adopted November 7, 1972. Initiative measure.]

APPENDIX B

California Penal Code Provisions Relating to Murder

Sec. 190. [Punishment for murder]

Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1 Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.
Added Stats. 1973 ch 719 § 2.

Sec. 190.1. [Procedure in case involving death penalty]

In any case in which the death penalty is to be imposed as the penalty for an offense only upon the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In

case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime. If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which cases a new jury shall be drawn to determine the issue of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unble to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such a new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life. Added Stats 1973 ch 719 § 4.

Sec. 190.2 [Mandatory death penalty upon special finding]

The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling house entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

Added Stats 1973 ch 719 § 5.

Sec. 190.3. [Death penalty for person under eighteen prohibited]

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts. Added Stats 1973 ch 719 § 6.